STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

In the Matter of Global NAPs, Inc.	)	
	)	Docket No.: 02-0253
Petition for Arbitration Pursuant to	)	
Section 252(b) of The	)	
Telecommunications Act of 1996	)	
to Establish an Interconnection	)	
Agreement with Verizon North Inc. f/k/a	)	
GTE North Incorporated and Verizon	)	
South Inc. f/k/a GTE South Incorporated.	)	

APPLICATION FOR REHEARING OF VERIZON NORTH INC. AND VERIZON SOUTH INC. TO THE ARBITRATION DECISION

Verizon North Inc. and Verizon South Inc. ("Verizon") submit the following Application for Rehearing of the *Arbitration Decision* released by the Commission on October 1, 2002. Pursuant to 83 Ill. Adm. Code 200.880, Verizon sets forth below the issues on which it seeks rehearing, its positions on those issues, and new legal authority in support of those positions not previously available to Verizon.

I. ARGUMENT

Issue 1 The Commission Should Order the Parties to Adopt Verizon's Proposed Section 2.1.1 To The Interconnection Attachment Because It Applied the Wrong Legal Standard When Reviewing The Parties' Competing Language

As the Commission is well aware, the Telecommunications Act of 1996 (the "Act") requires incumbents to provide for "interconnection at any technically feasible point ***within the carrier's network***."[1] Specifically, the Commission cited this controlling principle in its *Proposed Arbitration Decision*, stating that a "CLEC may elect to interconnect with an ILEC at

[1] 47 U.S.C. § 251(c)(2) (emphasis added).

any single, technically feasible point ***on the ILEC's network.***"[2] Moreover, while GNAPs' witness admitted at the arbitration hearing that he was not familiar with GNAPs' proposed language allegedly capturing this obligation,[3] he also agreed that CLECs "have the express right to establish interconnection 'at any technically feasible point' ***on the ILEC's network***."[4]

Verizon concurs that interconnection is permitted at any technically feasible point on its network. However, GNAPs' edited version of § 2.1.1 to the Interconnection Attachment does not adequately reflect this FCC rule. On the contrary, GNAPs has sheared off the "on the ILEC's network" language from this section as originally proposed by Verizon.[5] As it reads now, § 2.1.1 provides as follows:

> In accordance with, but only to the extent required by, Applicable Law, the Parties shall provide interconnection of their networks at any technically feasible point as specified in this Agreement.[6]

Without more, GNAPs could interpret the truncated version of § 2.1.1 to permit GNAPs to designate "any technically feasible point" for interconnection anywhere on or off Verizon's existing network. In short, GNAPs might argue that § 2.1.1 obligates Verizon to build out its facilities to meet GNAPs at some distant, off-network point. Verizon has ***never*** agreed to such

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[2] *Proposed Arbitration Decision* at 3 (emphasis added).

[3] IL Hearing Tr. at 29:2-7.

[4] Lundquist Direct at 6:9-10 (emphasis added).

[5] Verizon's originally proposed § 2.1.1 included four additional descriptive sentences that embodied the "on the ILEC's network" principle – referencing, for example, "interconnection of the Parties' respective networks."

[6] Verizon's original § 2.1.1 also included this additional language: "GNAPs may designate a single point of interconnection per LATA. This point shall be called the Point of Interconnection ("POI") between the Parties. The Parties may designate additional POIs within the LATA at a later date, however, only one GNAPs designated POI per LATA is required for interconnection of the Parties' respective networks. Each Party is responsible for transporting telecommunications traffic on their network to the POI at their own cost." While longer than the phrase "on the ILEC's network" or "on Verizon's network," this additional language more accurately and adequately reflects 47 U.S.C. § 251(c)(2).

an obligation, nor does the law require it. The interconnection agreement should reflect that fact lest GNAPs decide to give § 2.1.1. a meaning that apparently no one presently thinks it has.

The Commission dismissed Verizon's concerns in this regard, deeming Verizon's argument that GNAPs had not provided any evidence supporting its edits to § 2.1.1 as "puzzling . . . since the language simply reflects the resolution of a *legal* issue (about which the parties concur) concerning the meaning of a subsection in the Federal Act."[7] That is not the proper standard, however. While the interpretation of an FCC rule is a purely legal issue, whether one party's proposed language accurately reflects the law is largely a *factual* issue – the determination of which depends upon the evidence set forth by the parties. The Rhode Island arbitrator, in his recent *Arbitration Decision* resolving Verizon and GNAPs' identical arbitration issues in that state,[8] described the proper standard this way:

[7] *Arbitration Decision* at 3 (emphasis in original).

[8] In addition to all of the other states that have ruled in Verizon's favor on Arbitration Issue 1 – including California, New York, and Ohio – the Pennsylvania, Rhode Island, and New Hampshire Commission arbitrators all ruled in Verizon's favor and issued their Recommended Decisions on October 10, 2002, October 16, 2002, and October 29, 2002, respectively. *See* Verizon's Exception Brief at 3, n.9. *See also Petition of Global NAPs South, Inc. For Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions With Verizon Pennsylvania Inc.*, Recommended Decision, PA PUC Docket No. A-310771F7000 (Oct. 10, 2002) ("Pennsylvania Verizon/GNAPs Initial Arbitration Order") at 6 ("It is clear therefore that GNAPs need only interconnect at any technically feasible point within Verizon's network, and to the extent that this is not reflected in the proposed agreement, it should be. Same is recommended."); *In re: Arbitration of the Interconnection Agreement Between Global NAPs and Verizon-Rhode Island*, State of Rhode Island and Providence Plantations Public Utilities Commission Docket No. 3437, Arbitration Decision (Oct. 16, 2002) ("*Rhode Island Verizon/GNAPs Initial Arbitration Decision*") at 22 ("At an arbitration proceeding each party has the burden of presenting evidence that explains and justifies its proposed contract provisions. GNAPs failed to meet its burden on issue one . . . Accordingly, VZ-RI's position for issue one is adopted."); *In the Matter of Global NAPs, Inc. Petition for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon NH Inc. f/k/a Bell Atlantic-New Hampshire, Inc.*, Report and Recommendation of the Arbitrator Addressing Contested Issues, NH PUC Docket No. DT-02-107 (Oct. 29, 2002) ("New Hampshire Verizon/GNAPs Initial Arbitration Decision") at 5 ("In so far as the contract language is concerned, we agree with the Rhode Island Arbitration Decision that the language which Verizon has proposed to include in the interconnection agreement to address this issue is far simpler and clearer. We therefore recommend to the Commission that it adopt the language proposed by Verizon on this issue.") Since the Pennsylvania, Rhode Island, and New Hampshire arbitrators issued their initial orders after the Commission issued its *Arbitration Order*, this is the first opportunity Verizon has had to introduce these rulings to the Commission for consideration.

> For issue one, the parties were in agreement that federal law allows a CLEC to interconnect at a single technically feasible point on the ILEC's network. Essentially, under federal law, GNAPs can establish a single POI per LATA at a technically feasible point on VZ-RI's network. The dispute arose over what contract language should be utilized in the ICA to implement this federal law. VZ-RI provided a witness who could explain VZ-RI's proposed contract language for this issue. GNAPs' witness could not testify as to GNAPs' proposed contract language for issue one. ***At an arbitration proceeding each party has the burden of presenting evidence that explains and justifies its proposed contract provisions. GNAPs failed to meet its burden on issue.***[9]

As in Rhode Island, Verizon witness D'Amico explained to this Commission Verizon's proposed contract language for Arbitration Issue 1.[10] As in Rhode Island, GNAPs witness Lundquist was unable to testify to the Commission as to GNAPs' proposed contract language for Arbitration Issue 1.[11] Consequently, as in Rhode Island, GNAPs failed to meet its evidentiary burden in Illinois as well.

Since GNAPs has not presented evidence that explained or justified its edits, Verizon's proposed language for § 2.1.1 should have been adopted. It provides clarity to an otherwise vague contract provision and should be adopted. The Commission likewise should amend the *Arbitration Decision* to include the language that Verizon has proposed in its Exceptions Brief at page 3.

In further support of this conclusion, Verizon incorporates by reference all of its arguments and its proposed language in its Post-Hearing Brief at pages 5 through 7, and in its

[9] *Rhode Island Verizon/GNAPs Initial Arbitration Decision* at 22.

[10] D'Amico Direct at 3:12-25; 4:1-4; IL Hearing Tr. at 132:6-22; 133:1-15.

[11] IL Hearing Tr. at 29:2-7.

Exceptions Brief at pages 1 through 3. In the event the Commission is not inclined to adopt Verizon's proposed language, however, Verizon requests that the Commission adopt, at the very minimum, the following language for Interconnection Attachment § 2.1.1 for the reasons stated:

> 2.1.1. In accordance with, but only to the extent required by, Applicable Law, the Parties shall provide interconnection of their networks at any technically feasible point ***within Verizon's network*** as specified in this Agreement.

Issue 2 The Commission Should Order The Parties to Adopt Verizon's VGRIP Proposal Because GNAPs Will Not Bear Any Intercarrier Transport Obligation in Illinois and Because the Commission Applied The Wrong Evidentiary Standard

The Commission should reverse its ruling in favor of GNAPs on Arbitration Issue 2 and order the parties to adopt Verizon's VGRIP proposal. Verizon's proposal permits GNAPs to physically interconnect with Verizon at only one point on Verizon's existing network while equitably allocating the costs associated with GNAPs' network design decisions. The Commission has erroneously ruled that GNAPs' rejection of this proposal results insofar as (1) GNAPs will undertake an intercarrier transport obligation like Verizon's once the parties interconnect in Illinois, and (2) Verizon's costs for transporting traffic to GNAPs' distant POI will be *de minimis*. The evidence does not support either conclusion.

First, GNAPs presented no evidence that it is now or will ever be transporting telecommunications traffic between itself and Verizon in Illinois. Instead, GNAPs will only switch traffic to customers located at its switch. The Commission nevertheless found that the equities were on GNAPs' side on this point, stating as follows:

> Furthermore, we note that Global "has only one switch in the state and must often transport calls great distances." Global RBOE at 8. Global's election to impose a substantial transport obligation on

> itself is reflective of the negligible incremental cost of moving traffic over additional distance.[12]

GNAPs is not a carrier like Verizon. As the record shows, almost all of GNAPs' customers will be collocated at the GNAPs POI, meaning that almost all of the intercarrier telecommunications traffic passing between Verizon and GNAPs will pass from Verizon to the POI to GNAPs' collocated customers at that location. Since most of those business customers will not be sending traffic in the other direction (i.e., back to Verizon customers), as most other carriers' customers do, GNAPs' costs for transport will be practically *zero*. In his direct testimony, Verizon witness D'Amico testified on this point as follows:

> It has been Verizon's experience with GNAPs in other jurisdictions, as well as in other arbitrations with GNAPs, that GNAPs' network architecture plan is to deploy relatively fewer switches and rely more on transport. ***As part of this plan, GNAPs generally markets its services to customers who receive more traffic than they originate, such as Internet Service Providers ("ISPs"). These GNAPs' customers often will collocate at GNAPs' facilities. So, if GNAPs chooses to locate one POI close to its only switch in a LATA, where GNAPs' customer is collocated and this customer receives far more traffic than it terminates, then Verizon provides virtually all the transport for GNAPs' network. And, according to GNAPs' proposal, Verizon provides the facilities for this transport free of charge.***[13]

GNAPs has offered no testimony to the contrary. Moreover, as referenced in both Verizon's Post-Hearing and Exceptions Briefs,[14] GNAPs' own website touts collocation opportunities to potential business customers (i.e., ISP customers) as its primary service offering. "Our primary focus is high volume, high usage business customers," it states.[15] The GNAPs CO-location link

[12] *Arbitration Decision* at 10, n.17.

[13] D'Amico Direct at 7:17-22; 8:1-2.

[14] Verizon's Post-Hearing Brief at 11, n.22; Verizon's Exceptions Brief at 4, n.11.

[15] http://www.gnaps.com/aboutuspage.html (visited October 23, 2002).

on the same website, moreover, highlights is primary service offering to GNAPs' primary high volume, high usage business customers:

> Global NAPs Real Estate has immediate availability of CO-location space in all of its state-of-art facilities. LA, CA, Miami, FL, Atlanta, GA, Quincy, MA, Manchester, NH, NYC, Providence, RI, and Reston VA. We are carrier neutral. The cost is $500.0 per month plus a one-time $1000.00 set up fee per rack which includes one 120V/20 Amp Circuit, standard, and 208, 3 phase, or -48 Vdc. This includes full security, "Hot hands," At least 250 kw of standby power as well as a "Carrier-neutral, no hassle environment," We have made arrangements for other carriers to serve you. The site has 24/7 access, hands on support is available. We also have Switched Services and Internet Bandwidth through our affiliates.[16]

Notably, GNAPs' website makes no mention of opportunities for residential telephone customers who, unlike ISPs and other high volume, high usage business customers, do not and would not collocate at GNAPs' facilities. As noted above, however, such customers *would* actually place calls in the reverse direction to Verizon's customers – imposing transport costs on GNAPs. By not marketing to such customers, however, GNAPs avoids those costs.

In view of both GNAPs' acknowledged business plan and its anticipated limited physical presence in Illinois, Verizon will be the party bearing the vast majority of intercarrier transport costs during the life of the interconnection agreement.[17] Verizon's point is that those costs – *de minimis* or not – should be shared as a matter of fundamental fairness. The allegedly "substantial transport obligation" that GNAPs may have imposed upon itself internally, and the costs that come with it, are irrelevant.[18] What the Commission should concern itself with in this § 252

[16] http://www.gnaps.com/CO-locationpage.html (visited October 23, 2002).

[17] GNAPs witness Lundquist conceded that GNAPs wants to deploy a relatively small number of switches in Illinois and thereby, transport traffic over relatively greater distances. Lundquist Direct at 12.

[18] *Arbitration Decision* at 10 n. 17.

arbitration are the transport costs that GNAPs' business choices will unfairly impose almost exclusively – if not totally – upon Verizon.

Second, GNAPs has not established that those costs will be *de minimis*. Rather than requiring GNAPs to make its case, however, the *Arbitration Order* erroneously placed the burden of establishing the amount of incremental transport costs in question mainly upon *Verizon*:

> The significant issue here is whether the traffic volume to and from a single POI would cause incremental costs to Verizon that are more than trivial. Verizon does not show that this is so. It provides no bases (i.e. estimates of traffic volume, incremental distance and unit cost) for making a calculation.[19]

The Commission has misplaced the burden of proof. Since GNAPs is the Petitioner in this proceeding, GNAPs has the burden of proof. Even if that burden were on Verizon, however, Verizon and GNAPs are not presently exchanging telecommunications traffic in Illinois. Any estimates by Verizon as to traffic volume, incremental distance, and unit cost would be as much guesswork on Verizon's part as GNAPs witness Lundquist's estimates are in his testimony. Accordingly, Lundquist's incremental transport cost estimates should be ignored.

Lundquist's own admissions during the hearing bears this out. During cross-examination, Lundquist admitted that he did not know what Verizon would charge GNAPs for the additional transport in issue.[20] He likewise admitted that he was not familiar with the prices that Verizon offered to GNAPs to transport this traffic *or the applicable cost proceedings that*

[19] *Id.* at 8.

[20] IL Hearing Tr. at 73-76.

established those prices.[21] Notwithstanding the fact that the Commission has previously set Verizon's wholesale rates at TELRIC costs, the Commission wrongly opined that it is Verizon's costs and not Verizon's prices that are "essential" to the determination of whether Verizon's incremental transport costs would be *de minimis*. Lundquist's unfamiliarity with **both** only underscores the inadequacy of his testimony as a basis for the Commission's decision.[22]

Given the deficiencies in both Lundquist's prepared testimony and his live testimony described above, it should have been apparent to the Commission that using Lundquist's creative cost analysis was not a proper basis for determining Verizon's incremental cost for transport. As Verizon witness Collins explained, that rule has no bearing on the incremental transport costs involved here:

> The most serious flaw plaguing Mr. Lundquist's analysis is his confusion of dedicated versus common transport applications. The incremental transport at issue in this proceeding is dedicated to the transmission of traffic between Verizon and GNAPs only. Therefore, the cost of this incremental dedicated transport is entirely dependent upon the number of dedicated transport transmission paths (and their associated lengths) from various Verizon transport hubs to GNAPs. So any attempt to transform a dedicated DS-3 facility rate into per minute use is inappropriate. By dividing the $30.27 dedicated DS-3 transport rate by an assumed 8.9 million minutes, Mr. Lundquist, in effect, has artificially imposed the scale and scope of common transport facilities on a dedicated transport application. It is this misapplication of scale and scope economies that allows Mr. Lundquist to -- on one hand criticize Verizon's rates for being too

[21] *Id.* at 58-59; 74-76.

[22] *Arbitration Decision* at 8. As noted in Verizon's Exceptions Brief at pages 5-6, n.15, it is clear from reading the transcript of the hearing that the court reporter made a typographical error when it was recorded that Mr. Lundquist said "I have," instead of "have not" with respect to his review of Verizon's cost study. Read in context, Mr. Lundquist proceeds to say that "and I assume that would be proprietary to that document." It is also obvious that what Lundquist said was "proprietary to that docket," rather than "document," as he was discussing a cost proceeding.

> high -- while at the same time manipulate those same rates in order to come up with what he believes to be a *de minimis* cost.[23]

In view of these problems, Collins also testified that GNAPs "definitely" underestimated the cost of Verizon providing transport to GNAPs at the distant POI.[24] The Commission mistakenly dismissed Mr. Collins' testimony as unanalytical and "largely rhetorical," and again applied the wrong standard.[25] Not only did GNAPs have the burden of proof in this proceeding, but also the Commission's adoption of Lundquist's cost analysis makes a mockery of this Commission's own decision to establish a DS-3 rate for Verizon's dedicated transport.

Given these factors, the Commission should order the parties to adopt Verizon's proposed language for Arbitration Issue 2 and to amend the *Arbitration Orde*r with the language set forth by Verizon on pages 9-10 of its Exceptions Brief. In further support of this conclusion, Verizon incorporates by reference all of its arguments and its proposed language in its Post-Hearing Brief, on pages 7 through 21, and in its Exceptions Brief on pages 4-9.

If the Commission is not so inclined, however, it should direct the parties to revisit this issue after the conclusion of the ongoing UNE proceeding in Illinois, where parties are submitting actual cost studies based on actual data. In so doing, the Commission also should provide Verizon with an opportunity to move to amend the interconnection agreement as necessary after the parties have actually interconnected in Illinois and after the UNE proceeding has concluded.

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[23] Collins Direct at 4.

[24] IL Hearing Tr. at 127:4-15.

[25] *Arbitration Decision* at 9.

Issue 4 The Commission Should Order GNAPs to Pay Verizon Access Rates For Its Virtual NXX Service Because It Missed Key Evidence About the Feasibility of Tracking Virtual NXX Calls and Did Not Consider the Costs of a Bill and Keep Regime to Verizon

The Commission should order the parties to apply access charges to GNAPs' virtual NXX calls rather than the bill and keep regime adopted in the *Arbitration Decision*. In that decision, the Commission rightly rejected GNAPs' argument that reciprocal compensation should apply to FX-like calls because Verizon records all such calls as local.[26] As the Commission noted, FCC Rules 701-717 have no application to FX-like traffic because Verizon "presently places toll charges on the pertinent interexchange traffic and would continue to do so, absent Global's effort to make such toll charges inapplicable."[27] Recognizing the arbitrage opportunities that GNAPs' proposal would create, the Commission added:

> Moreover, the final destination of FX-like traffic is, by its very nature, beyond the caller's LCA, with virtual NXX being simply a device to relieve the caller of toll charges. A virtual NXX or FX-like number assignment is a service provided by the customer's LEC and should not be subsidized by a competing LEC. If Global wants compensation for costs incurred in providing that service, it can charge the customer. The Commission has repeatedly held that FX-like traffic is not subject to reciprocal compensation.[28]

However, the Commission rejected Verizon's argument that the access charges that otherwise would apply to GNAPs' FX-like *should* apply to that traffic, stating as follows:

> Verizon does not explain how its recording systems will be able to recognize virtual NXX calls for the purpose of assessing Verizon's originating access charges when they cannot recognize the same calls for the purpose of imposing Verizon's intraLATA toll charges. Verizon is also silent with respect to the terminating access charges it would owe Global if virtual NXX calling were

[26] *Arbitration Order* at 16.

[27] *Id.* at 17.

[28] *Id.* (citations omitted).

> treated as toll calling for intercarrier compensation purposes. Additionally, Verizon does not acknowledge that it will also receive compensation, through local service charges, from the Verizon customer that places a local call to a Global virtual NXX.[29]

The Commission is mistaken. During the arbitration hearing, Verizon witness Haynes did in fact testify about how a Verizon manual recording system could distinguish FX-like calls from local calls, so long as GNAPs provided Verizon with a list of its virtual NXX numbers:

> With a single company, if you wanted to do something different [from Verizon's automatic systems], the manual process I would envision would be a list of numbers being provided to us that would be unique in their characteristic. They [GNAPs] would have to suggest to us, for example, this list of 50 numbers will be the numbers that will be terminated outside the local calling area, we want you to handle those special for us.
>
> And that would be a manual process in our billing system and obviously would be an increased cost from a handling perspective. It would have those normal problems you have with manual processes. We always like to mechanize our processes to clean them up and make sure we don't have errors in them. But that's how it's envisioned. It would be very much a manual process.[30]

Furthermore, Verizon has *not* been silent with respect to the terminating access charges that it would owe GNAPs if virtual NXX calling were treated as toll calling for intercarrier compensation purposes.[31] The subject simply never came up. If Verizon were permitted to assess the access charges that normally would apply to virtual NXX calls, then Verizon would owe GNAPs terminating access charges and Verizon would pay them. Furthermore, the fact that "Verizon does not acknowledge that it will also receive compensation, through local service

[29] *Id.*

[30] IL Hearing Tr. at 280:1-19.

[31] *Arbitration Decision* at 17.

charges, from the Verizon customer that places a local call to a Global virtual NXX" is irrelevant.[32] When a call would be deemed a toll call "absent Global's effort to make such toll charges inapplicable," access charges *should* apply to that call.[33] Compensating Verizon at the lower local rate is hardly equitable under the circumstances.[34]

Finally, Verizon recognizes that in the *Essex Telecom* case, the Commission held that virtual NXX traffic should be subject to a bill and keep regime.[35] However, while a bill and keep regime solves the problem of GNAPs receiving reciprocal compensation for calls that Verizon must transport, it does not compensate Verizon for transporting a call outside of its local calling area. GNAPs, as the beneficiary of the transport, should either compensate Verizon for such transport or not misassign NXX codes such that Verizon transports the virtual NXX calls without compensation.

As described above, since Verizon can distinguish FX-like calls from virtual NXX calls with GNAPs' cooperation, the Commission should order GNAPs to provide Verizon with lists of its virtual NXX numbers and pay Verizon access charges when GNAPs causes a call to be transported outside of Verizon's local calling area. Accordingly, the Commission should order the parties to adopt Verizon's proposed language for Arbitration Issue 4. Finally, the Commission should amend the *Arbitration Decision* to include the language that Verizon has proposed on page 12 of its Exceptions Brief.

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[32] *Id*.

[33] *Id.*

[34] Both the Pennsylvania and Rhode Island arbitrators have followed the lead of other state commissions and have ruled in Verizon's favor on Issue 4 as well. *See Pennsylvania Verizon/GNAPs Initial Arbitration Order* at 13-17; *Rhode Island Verizon/GNAPs Initial Arbitration Order* at 26-33.

[35] *Essex Telecom, Inc. v. Gallatin River Communications,* L.L.C., Docket No. 01-0427 (July 24, 2002).

In further support of this conclusion, Verizon incorporates by reference all of its arguments and its proposed language in its Post-Hearing Brief on pages 27 through 32, and in its Exceptions Brief on pages 11-12.

Issue 10 The Commission Should Reverse Its Decision That The Additional Insured Requirement Should Be Reciprocal Because It Has Mistaken The Nature and Function of an Additional Insured Provision

The Commission should reverse its ruling requiring that the parties name each other as additional insureds in their respective insurance contracts and should instead impose that obligation on GNAPs only. Notably, nowhere in any of GNAPs' filings did GNAPs request that the Commission impose a reciprocal additional insured requirement. When rejecting Verizon's arguments in this regard, however, the Commission stated as follows:

> On exceptions, Verizon asserts that it would be "counterproductive" for each party to become an additional insured on the other's policies, because it would fail to alleviate "the problem of two insurance companies fighting over which will take initial responsibility for the defense of a claim." Verizon BOE at 15. However, it is not apparent that Verizon's asymmetrical proposal, in which Verizon would be an additional insured on Global's policies but Global would not be additionally insured by Verizon, would alleviate that problem either. A claim solely against Verizon would be insured by two carriers (Verizon's and Global's), and Verizon has not established that Global's carrier would be, or should be, responsible for defense in that instance. Verizon's proposal places greater insurance costs to Global than Verizon, without avoiding the problem Verizon identifies.[36]

The Commission appears to have misunderstood the concept. An additional insured provision by its very nature is intended to be "asymmetrical." Moreover, the Commission's concern that a

[36] *Arbitration Decision* at 23.

claim brought "solely against Verizon" would permit Verizon to drag GNAPs into litigation via an "asymmetrical" additional insured provision is misguided. Verizon details both points below.

As an initial matter, in each state in which GNAPs and Verizon have arbitrated this issue, state commissions have required GNAPs to name Verizon as an additional insured on GNAPs' liability insurance policy. The New York Commission adopted Verizon's proposed language in its arbitration with GNAPs in that state, observing that Verizon's proposal "does not in itself create a competitive advantage, in light of Verizon's substantial exposure as the network provider."[37] The California and Ohio Commissions also ruled that GNAPs would be required to maintain a $10 million excess liability insurance policy and include Verizon as an additional insured under its policies in those states.[38] Moreover, the Pennsylvania and New Hampshire arbitrators adopted Verizon's proposals entirely.[39] Importantly, these commissions ***did not*** require that Verizon name GNAPs an additional insured on Verizon's policy. Such an

[37] *In re Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc.*, Arbitration Order, Case No. 02-C-0006 (N.Y. PSC May 22, 2002) ("*New York Verizon/GNAPs Arbitration Order*") at 18.

[38] *In the Matter of Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Verizon California Inc. f/k/a GTE California Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Final Arbitrator's Report, Application No. 01-12-026, Decision 02-06-076 (May 15, 2002) ("*California Verizon/GNAPs Final Arbitrator's Report*") at 97, *aff'd by In the Matter of Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Verizon California Inc. f/k/a GTE California Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Opinion Adopting Final Arbitrator's Report With Modification, Application No. 01-12-026, Decision 02-06-076 (June 27, 2002) at 2 ("*California Verizon/GNAPs Arbitration Order*"); *In the Matter of the Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc.*, Panel Arbitration Report, Ohio PUC Case No. 02-876-TP-ARB (July 29, 2002) at 20, *aff'd* by *In the Matter of the Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc.*, Arbitration Award, Ohio PUC Case No. 02-876-TP-ARB (Sept. 5, 2002) at 11.

[39] *Pennsylvania Verizon/GNAPs Initial Arbitration Order* at 23-25; *New Hampshire Verizon/GNAPs Initial Arbitration Order* at 21 ("[W]e recommend that the Commission find in favor of Verizon . . . We do not agree with GNAPs that what Verizon is proposing is discriminatory, we think instead that it is prudent business practice . . . In addition, we consider it appropriate to require GNAPs to name Verizon as an additional insured.") While the Rhode Island arbitrator made the additional insured obligation mutual, that decision is the subject of an Exceptions Brief being filed simultaneously today by Verizon with the Rhode Island Commission. *See Rhode Island Verizon/GNAPs Initial Arbitration Order* at 35.

arrangement would defeat the primary purpose of being named as an additional insured in a contractual arrangement such as the one between Verizon and GNAPs.

The term "additional insured" is a term of art in the insurance industry intended to signify those insureds that are not automatically included as insureds under the liability policy of another but for whom the named insured is required to provide a certain degree of protection under its liability policies.[40] The parties who are most often named as additional insureds are companies or organizations with whom the named insured has a business relationship. These additional insureds – like Verizon – are often either the owners of the property that the named insured rents or leases or are the suppliers of products and services under a general contract agreement. The purpose of naming a party such as a property owner as an additional insured on a named insured's liability policy is to protect that party from liability arising out of the named insured's activities. Examples of these types of additional insureds include:

- Owners or lessors of real estate named on the policies of lessees or tenants;
- Lessors of leased equipment named on the policies of lessees;
- General contractors named on the policies of subcontractors;
- Project owners named on the policies of general contractors; and
- Retailers and distributors named on the policies of manufacturers.[41]

The contractual arrangement that exists between Verizon and GNAPs is exactly the arrangement that additional insured provisions exist to cover. As Verizon witness Karen

[40] Donald S. Malecki, Jack P. Gibson, & Pete Ligeros, *The Additional Insured Book*, 45 (3d ed. 1997).

[41] *Id*.

Fleming explained in her direct testimony, the facilities-based interconnection agreement that will result from this proceeding will provide GNAPs the ability to collocate ***at a Verizon facility***. Collocation increases Verizon's risk and exposure to loss in many ways, including:

- the risk of injury to its employees;
- possible damage to or loss of its facilities and network;
- the risk of fire or theft, the risk of security breaches; and
- possible interference with, or failure of, the network.[42]

The FCC, moreover, has concluded that "LECs are justified in requiring interconnectors to carry a reasonable amount of liability insurance coverage," including automobile insurance, workers' compensation and employer liability insurance.[43]

The applicability of an additional insured provision to the interconnection agreement context does ***not*** mean that it should have reciprocal application, however. On the contrary, an additional insured provision is based on the notion of "contractual risk transfer." Contractual risk transfer is the term that defines the attempt of one party to a contract to allocate potential legal liabilities that could arise in connection with the performance of a contract to the other party to the contract in a manner that would not have occurred in absence of the contract. The rationale behind contractual risk transfer is to make the party with the most control over the risk responsible for suffering the financial loss should it fail to prevent losses from occurring.[44]

[42] Fleming Direct at 3:12-18.

[43] *See, e.g., In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Tra*nsport, Second Report and Order, FCC Docket No. 93-162, FCC 97-208 rel. June 13, 1997 ¶ 345 ("*FCC Second Report*").

[44] Malecki et. al., *The Additional Insured Book* at 46.

The contractual provision most often used to accomplish these transfers is an indemnity provision. An indemnity provision is an agreement by which one party (the indemnitor) assumes the legal liability of the other party (the indemnitee). Problems arise when courts find indemnity agreements unenforceable, thereby preventing contractual liability coverage from occurring.[45]

An additional insured clause extends the benefits of a liability policy to another party (i.e., a lessor or general contractor).[46] When a party is included as an additional insured on the policy of another, the provisions of the policy that apply to the insured also apply to the additional insured. Motives for requiring additional insured status on the policy of another include:

- giving those who attempt to transfer risk to others direct rights under the other party's insurance, particularly with respect to defense coverage;
- avoiding having losses impact the loss history of the additional insured, thus avoiding increased insurance premiums for the additional insured in future years;
- lessening the chance that the additional insured will be forced to sue the indemnitor directly in order to be made whole following the claim or suit; and
- increasing the chances of cooperation between the indemnitor and indemnitee in the event of a claim or suit.[47]

In other words, when two parties have insurance coverage for the same assets or potential losses, the function of the "additional insured" provision is to ensure that one of the insurance companies takes the lead in providing a defense. Verizon witness Fleming explained in her

[45] *Id*.

[46] *See id.* at 46.

[47] Malecki et. al., *The Additional Insured Book* at 46-47.

direct testimony that such an arrangement will not ultimately determine which parties' insurance policy will provide coverage – that question is tied to the fact-specific analysis of the event giving rise to a loss and a coverage question – but it will avoid having two insurance companies point their fingers at each other rather than move forward to resolve the underlying claims. The additional insured provision makes it clear that one company must assume the notice of claim and defend against it.[48] In short, if Verizon is listed as an "additional insured" on GNAPs' policies, Verizon will have less difficulty in obtaining recovery if there is a loss stemming from GNAPs' operations. Verizon would simply file a claim rather than be forced to incur litigation expenses against both GNAPs and its insurance company in order to collect.[49]

As explained by Verizon witness Fleming, making the insurance requirements provision a mutual obligation simply does not make sense. It is counterproductive for both Verizon ***and*** GNAPs to name each other as additional insureds for several reasons. First, Verizon maintains an extensive insurance program that is financially sound and protects both parties should they be liable jointly and severally for the wrongful acts of the other.[50] Second, the risks associated with the interconnection agreement are increased primarily for Verizon, not GNAPs. Inasmuch as Verizon and other CLECs are not identically situated, the insurance required to be evidenced should vary accordingly.

In view of the above, the Commission's hypothetical of a claim being brought against Verizon only, and Verizon then dragging GNAPs in on the investigation and defense of the claim

[48] Fleming Direct at 6:21-23; 7:1-5.

[49] *Id*. at 7:5-9.

[50] *Id*. at 4:5-7. GNAPs apparently operates under the misunderstanding that Verizon self-insures. As Verizon witness Fleming testified, that is not the case. *See id*.

via an additional insured provision, misperceives how an additional insured provision actually operates. A claim "solely against Verizon,"[51] and caused solely by Verizon, would be covered *solely* by Verizon's policy and *not* by GNAPs' policy at all. Verizon could not use the additional insured provision as a "back door" to force GNAPs to defend against a claim that GNAPs had nothing to do with. Furthermore, under these circumstances, if a plaintiff brought her claim "solely against Verizon," GNAPs would not *want* to be an additional insured on Verizon's policy – for fear that the plaintiff might sue GNAPs simply because it appeared on Verizon's policy as a potential alternate source of compensation.

On the other hand, if a claim was brought solely against Verizon and Verizon believed that GNAPs or one of its subcontractors was partly or wholly responsible for the claim, then Verizon could invoke the additional insured provision of GNAPs' insurance policy. However, the additional insured provision would *not* automatically obligate GNAPs' insurance company to take the lead in investigating (and if necessary, defending) the claim. Instead, two criteria would initially have to be met. First, GNAPs' insurance company would request a copy of the interconnection agreement (which Verizon is obligated to provide under its proposed language) in order to determine whether the claim arose out of some activity, product, or service within the scope of that agreement. Second, GNAPs' insurance company would then determine whether the event was one for which GNAPs agreed to provide indemnification.

If both criteria are satisfied, GNAPs' insurance company would take the lead – at least on temporary basis – so an investigation of the incident can take place and an assessment of liability can be made. If GNAPs' investigation revealed that it was not the negligent party, then

[51] *Arbitration Decision* at 23.

Verizon's insurance company either would take responsibility for the claim or would conduct its own investigation. If the insurance companies ultimately disagreed as to who had been negligent, then they would become parties adverse to each other in litigation. At that point, however, the additional insured provision will have served its purpose: it got the ball rolling with regard to the initial investigation and eventual resolution of the claim.

The reason for requiring GNAPs to include Verizon as an additional insured on GNAPs' insurance policy, and not making that obligation reciprocal, is best illustrated by a hypothetical. Suppose a homeowner, who has a homeowner's insurance policy, hires a contractor to do some repair work to her roof. Suppose also that the contractor has his own insurance policy. While the homeowner has insurance, she nevertheless will want to be named as an additional insured on the contractor's policy. This is so for one main reason: if the contractor causes an injury on her property (i.e., the contractor drops a hammer off the roof onto the head of a visiting neighbor), the homeowner should not have to be held responsible for the contractor's negligence. Stated more specifically, she should not have to pay increased premiums on her homeowner's insurance policy that otherwise will result from the incident (1) with which she was not directly involved, and (2) over which she had no supervision or control.

However, if the contractor could require the homeowner to name him on her homeowner's insurance policy, the whole purpose of including the homeowner as an additional insured on the contractor's insurance policy would be defeated. In short, the distinction between the homeowner and the contractor in terms of who had most control over the risk would be eliminated. Since insurance companies do not normally come running with open checkbooks to resolve a claim, neither insurance company would want to take the lead in defending it. Accordingly, any resolution of the injured party's claim would likely be delayed. Since the

contractor ***is*** the party with the most control over the risk, however, his insurance company should take the lead in defending the claim – on at least a temporary basis – so an investigation of the incident can take place and an assessment of liability can be made. As noted in Verizon witness Fleming's testimony, moreover, without one party stepping up to the plate, both parties eventually will be required to conduct their own investigations, creating the duplication of effort and waste of resources that an additional insured provision is designed to avoid.

The arrangement between Verizon and GNAPs presents the same concerns. GNAPs will have its facilities at Verizon's central office. Assume that a piece of GNAPs equipment overloads and sends chemical fumes throughout the Verizon central office, damaging the facilities of other CLECs located there. Those other CLECs, not knowing who is to blame, likely will sue Verizon. If Verizon is named as an additional insured on GNAPs' policy, as Verizon proposes, GNAPs' insurance company will take the lead in investigating (and, if necessary) defending the lawsuit filed by the other collocated CLECs. If, however, GNAPs is also named as an additional insured on Verizon's policy, as the Commission proposes, the two insurance companies will point fingers at each other and a fight will likely ensue over which insurance company is responsible for defending the lawsuit. This is precisely the situation that Verizon wants to avoid, which is why it proposes that GNAPs not be named as additional insured on Verizon's insurance policy.

Furthermore, the same fairness issues at play in the homeowner/contractor hypothetical exist here as well. Pursuant to the Act, Verizon (the "homeowner") must allow GNAPs (the "contractor") to come onto its premises for interconnection purposes. However, once GNAPs has established its presence at the Verizon central office, Verizon has no involvement with or control over either the facilities that GNAPs installs or the employees that GNAPs has working

at the premises. Since GNAPs is the party with the most control over the risk associated with its own facilities, however, its insurance company should take the lead in defending the claim brought by the other collocated CLECs – on at least a temporary basis – so an investigation of the incident can take place and an assessment of liability can be made. For the reasons stated, Verizon's insurance policy should not be needlessly triggered at the same time, resulting in increased premiums, until GNAPs first steps up to the plate. Indeed, without GNAPs taking the lead, the same double expenditure of resources described above will occur.

Finally, since Verizon is the party that interconnects with numerous CLECs in Illinois, it is far more reasonable for Verizon to be named as the "additional insured" in the CLECs' insurance policies. It is neither practical nor efficient for Verizon to name ***every*** other LEC who wishes to interconnect with Verizon as an additional insured on Verizon's policy. Such an arrangement would defeat the purpose of naming parties as additional insureds in arrangements such as these. Indeed, taken in the aggregate, the costs that would be imposed upon Verizon would be substantial.

For these reasons, Verizon should be included as an additional insured on GNAPs' policy to cover those claims (1) that would not have arisen but for GNAPs' interconnection, and (2) which include both GNAPs and Verizon as named defendants, without having to include GNAPs as an additional insured on its own policy. Accordingly, the Commission should order the parties to adopt Verizon's proposed language for Arbitration Issue 10. The Commission should also amend the *Arbitration Decision* to reflect the language that Verizon has proposed on page 16 of its Exceptions Brief.

In further support of this conclusion, Verizon incorporates by reference all of its arguments and its proposed language in its Post-Hearing Brief on pages 12 through 16, and in its Exceptions Brief on page 16.

Issue 11 Section 8.5.4 of the Additional Services Attachment Is Necessary To Ensure That All Carriers Receive Uninterrupted Access to Verizon's OSS System And Should Be Included In The Parties' Agreement

The Commission has adopted GNAPs' position with regard to § 8.5.4, completely eliminating Verizon's ability to audit GNAPs to ensure GNAPs' use of ***Verizon's*** OSS. The Commission should reconsider this result. Verizon's proposed § 8.5.4 not only protects Verizon's interests – to make certain that GNAPs is using OSS in the manner it was intended—but also ensures that all CLECs, not just GNAPs, can use Verizon's OSS to place an order or support a customer. Literally hundreds of CLECs, CMRS providers, and IXCs rely on access to Verizon's OSS. Section 8.5.4 merely provides Verizon with the right to monitor its OSS so that all carriers alike receive uninterrupted access to this system. In addition, customer proprietary network information ("CPNI") resides in Verizon's OSS database. To ensure that Verizon is meeting its obligation to protect CPNI, which includes the release of this information to authorized parties, Verizon must be able to monitor or audit GNAPs' use of Verizon's OSS. By monitoring or auditing a carrier's use of Verizon's OSS, Verizon can maintain the system integrity of its OSS for the nondiscriminatory benefit of all users.[52]

While Verizon provided the Commission with a factual basis for why it generally needs audit rights in the interconnection agreement, neither GNAPs' Petition nor GNAPs' witness testimony nor any other evidence presented by GNAPs provides any reason why Verizon should

[52] *See* 47 U.S.C. §§ 222, 251.

not be permitted to protect its OSS through the use of audits. GNAPs did not even address the subject until filing its *reply to Verizon's Exceptions Brief*. Apparently, all the Commission relied upon when reaching its decision was the following GNAPs' statements in that document:

> Verizon is currently able to monitor traffic reports to determine the veracity of Global's bills. Further, Global has consistently offered to provide all relevant call data records (CDRs) . . . The Commission should see this ruse and allow Global to preserve its confidential customer information without being subject to Verizon's prying eyes.[53]

However, without § 8.5.4, there is no guarantee that GNAPs' offer to provide call data will not be rescinded. Furthermore, without the audit rights contained in that provision, Verizon's ability to verify that Call Data Records are being populated correctly by GNAPs is significantly limited. Most importantly, since GNAPs is seeking to use Verizon's OSS, *Verizon will already have the information that GNAPs fears Verizon will obtain*. With § 8.5.4, Verizon merely seeks the ability to confirm that GNAPs is not obtaining information from Verizon about an end user's service without proper authorization. Without the ability to audit GNAPs' use of OSS and the information obtained from the OSS, Verizon cannot ensure that it is in compliance with Verizon's obligations to safeguard end user CPNI data that resides in Verizon's OSS. Verizon should be able to confirm that it is only releasing CPNI to GNAPs for which GNAPs has obtained authorization from the end user. Verizon should not be required to merely rely on GNAPs' assertion (by virtue of initiating an OSS transaction) that it has authorization to retrieve the requested CPNI.

[53] *See GNAPs' Reply Brief to the Exceptions of Verizon, By Global NAPs Illinois, Inc*., at 16.

In the Draft Arbitration Decision in California, the arbitrator also initially sided with GNAPs on § 8.5.4, asserting that "Verizon does not explain why it is necessary to audit GNAPs' use of Verizon's OSS information."[54] Once Verizon provided the explanation set forth above, however, she adopted Verizon's position, stating as follows:

> Additional Services § 8.5.4: In its Comments on the DAR, Verizon explains that it needs to make certain that GNAPs is using OSS in the manner intended. Hundreds of other carriers rely on access to Verizon's OSS, and Verizon wants the right to monitor its OSS so that all carriers alike receive uninterrupted access to this system. Verizon's argument is convincing, and its proposed language in this section is adopted.[55]

Moreover, all of the other state commissions that have decided this issue have adopted Verizon's proposed language – in order to avoid precisely the service problems that the Commission's rejection of § 8.5.4 would cause.[56] For the reasons stated, the Commission also should adopt this approach and order the parties to include § 8.5.4 in the Additional Service Attachment. Likewise, the Commission should revise the *Arbitration Decision* with the language that Verizon has provided on page 19 of its Exceptions Brief.

In further support of this conclusion, Verizon incorporates by reference all of its arguments and its proposed language in its Post-Hearing Brief on pages 49 through 52, and in its Exceptions Brief at pages 16-19.

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[54] *In the Matter of Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Verizon California Inc. f/k/a GTE California Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Draft Arbitrator's Report, Application No. 01-12-026, Decision 02-06-076 (May 15, 2002) ("*California Verizon/GNAPs Final Arbitrator's Report*") at 88.

[55] *California Verizon/GNAPs Final Arbitrator's Report* at 100, *aff'd by California Verizon/GNAPs Arbitration Order* at 2.

[56] *New York Verizon/GNAPs Arbitration Order* at 19; *Ohio Verizon/GNAPs Panel Arbitration Report* at 22-23; *aff'd by Ohio Verizon/GNAPs Arbitration Order* at 11-12; *Pennsylvania Verizon/GNAPs Initial Arbitration Order* at 26-27; *Rhode Island Verizon/GNAPs Initial Arbitration Order* at 36; *New Hampshire Verizon/GNAPs Initial Arbitration Order* at 22-23.

II.
CONCLUSION

Verizon's contract proposals are reasonable and supported by law and the record of this proceeding. Accordingly, the Commission should adopt Verizon's proposed contract language as noted in the Summary of Recommendations of Verizon's Post Hearing Brief and revise the *Arbitration Decision* as set forth in Verizon's Exceptions.

Dated: October 30, 2002.

Respectfully submitted,

VERIZON NORTH INC. AND
VERIZON SOUTH INC.

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CERTIFICATE OF SERVICE

I, Michael Guerra, hereby certify that I served a copy of the Petition for Rehearing of Verizon North Inc. and Verizon South Inc. upon the service list in Docket No. 02-0253 by email on October 30, 2002.

Michael Guerra